FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

November 2, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

We write to seek further information concerning apparent efforts by the Environmental Protection Agency (EPA) to prevent the codification of an important provision of the Clean Air Act. As you know, codification is the work of a nonpartisan congressional office and is intended to ensure that the various laws enacted by Congress are compiled into a single source—the United States Code—on which the public can rely. In this case, codification would remove an un-executable remnant of statutory language enacted in the 1990 amendments to the Clean Air Act. However, the agency has put great reliance on this language in its recently finalized regulations for existing fossil fuel-fired electric generating units, issued pursuant to section 111(d) of the Clean Air Act.[1] And there is reason to believe that agency officials may have worked to inhibit the congressional Office of Law Revision Counsel as it sought to fulfill its responsibility to codify the language of the Clean Air Act and other statutory provisions.

Whether EPA has authority to promulgate its regulations under section 111(d) has been the subject of extensive oversight and legislative activity before the Committee on Energy and Commerce and its Subcommittee on Energy and Power.[2] Section 111(d) of the Clean Air Act

---

[1] *See* "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64662 (October 23, 2015).

[2] *See, e.g.,* Committee Report for HR 2042, "Ratepayer Protection Act of 2015" at pp. 4-10 (June 19, 2015); "EPA's CO2 Regulations for New and Existing Power Plants" (Oct. 2015); "EPA's Proposed 111(d) Rule for Existing Power Plants, and H.R. __, Ratepayer Protection Act" (April 2015) and Press Release; "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues" (March 2015); "State Perspectives: Questions Concerning EPA's Proposed Clean Power Plan" (Sept. 2014); "FERC Perspectives: Questions Concerning EPA's Proposed Clean Power Plan and other Grid Reliability Challenges" (July 2014); "EPA's Proposed Carbon Dioxide Regulations for Power Plants" (June 2014); EPA's Proposed GHG Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation (Nov. 2013). *See also* E&C Majority Staff Report entitled "EPA's Proposed CO2 Regulations for Existing Power Plants: Critical Issues Raised in Hearings and Oversight" (Dec. 2014).

has had limited application and scope, and over the past four decades has been applied to only a few emissions sources, primarily in the 1970s and 1980s. In its "Clean Power Plan," however, EPA asserts that under this rarely invoked provision the agency has broad authority to impose mandatory carbon dioxide (CO2) emissions "goals" for each state's electricity sector and require states to develop complex plans to effectively restructure their electricity sectors. EPA asserts this authority notwithstanding that section 111(d) prohibits the agency from regulating any emissions source where the agency is, as here, already regulating that source under section 112 of the Clean Air Act.[3]

To support its broad assertion of regulatory authority, EPA has been relying upon an obscure "conforming amendment" in the Statutes at Large. The language of this amendment sought to strike a reference that had already been removed by a prior, substantive amendment by Congress in the very same law, which effectively made the conforming language impossible to execute. The Office of Law Revision Counsel (OLRC)—the nonpartisan authority for codifying the Statutes at Large into the U.S. Code—determined in 1992, following enactment of the Clean Air Act amendments, that this conforming amendment could not be executed. This is reflected at 42 U.S.C 7411(d). [4]

Eliminating this obsolete provision in the U.S. Code should have resolved the issue in 1992. However, because the OLRC had not yet completed its statutory process for enactment of the Clean Air Act into so-called positive law, the EPA has used the obsolete language in the Statutes at Large to create an argument that it actually had authority to promulgate section 111(d) regulations for CO2 emissions from power plants.[5] Of course, this argument rests upon the fact that this section of the U.S. Code is not yet positive law. At an October 22, 2015 hearing, one witness testifying in support of EPA's position acknowledged that "[t]he Statutes at Large trump the U.S. Code until Congress has enacted the title at issue into positive law, which has not occurred for Title 42."[6]

We now learn that, during the time that the agency was developing its 111(d) rule, the agency was also aware of, and invited to participate in, a statutorily mandated process underway to restate certain environmental portions of Title 42, including 42 U.S.C. 7411(d), as positive law.[7] This past week, the House Judiciary Committee reported favorably a bill that would enact the relevant provisions as a new positive law title 55 of the U.S. Code, thus removing any confusion about the obsolete language.

---

[3] 42 U.S.C. 7411(d). EPA began regulating electric generating units under section 112 of the CAA in 2012. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012).

[4] *See* 42 U.S.C. 7411(d) available at http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap85-subchapI-partA-sec7411.pdf at p. 6236 ("the substitution of '7412(b)' for '7412(b)(1)(A)', could not be executed, because of the prior amendment by Pub. L. 101–549, § 108(g)").

[5] For example, in the rule EPA states that "Where there is a conflict between the U.S. Code and the Statutes at Large, the latter controls." 80 Fed. Reg. at 64712.

[6] *See* Testimony of Richard Revesz, Lawrence King Professor of Law and Dean Emeritus, New York University School of Law, October 22, 2015, at p. 7, n. 13 available at http://docs.house.gov/meetings/IF/IF03/20151022/104065/HHRG-114-IF03-Wstate-ReveszR-20151022.pdf; *see also* 1 U.S.C. 204.

[7] The Office of Law Revision Counsel is required by law to engage in a comprehensive ongoing program, known as positive law codification, under which all general and permanent Federal statutory law is to be revised and restated. *See* 2 U.S.C. 285(b)(1).

In the course of its markup, the Judiciary Committee introduced the attached July 27, 2015 letter from EPA to the Judiciary Committee and a September 16, 2015 letter from the OLRC to the Judiciary Committee. This correspondence indicates that the OLRC has been undertaking a systematic, multi-year process and that the agency has declined for almost seven years to review the codification bills submitted by the OLRC to the Judiciary Committee (and posted on the OLRC website). During this time period the agency was developing its proposed 111(d) rule for existing power plants. From this correspondence it appears that the agency may have been inhibiting a statutorily prescribed process because it would undermine the agency's legal arguments supporting its 111(d) rulemaking.

EPAs failure to cooperate in this statutorily prescribed process raises serious questions about EPA's statements of authority to promulgate its 111(d) rule. At this time, we seek information to evaluate EPA's decisions and actions surrounding this codification process. Accordingly, pursuant to Rules X and XI of the U.S. House of Representatives, we ask that you provide responsive documents and written responses to the following requests by November 16, 2015:

1. Describe which office(s) within the EPA, for the period 2009 through the present, have had responsibility for responding to requests from OLRC relating to the positive law codification process for the Clean Air Act (CAA).

    a. Describe all activity by EPA officials, employees, or contractors to review, comment, or provide technical assistance in response to OLRC questions relating to the positive law codification process for the CAA.

    b. Provide all documents in the possession of the EPA relating to the OLRC positive law codification process for the CAA, including, but not limited to, notes, analyses, reports, and memoranda, and all drafts of such documents.

2. Provide all documents in the possession of the EPA containing communications between and among EPA, other federal agencies, or third parties regarding the potential codification of the CAA and legislative proposals to enact the CAA into positive law.

We appreciate your prompt attention to this request. Instructions for responding to the Committee's document requests are included as an attachment to this letter. Should you have any questions, please contact Peter Spencer or Mary Neumayr of the majority committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Tim Murphy
Chairman
Subcommittee on Oversight
and Investigations

Ed Whitfield
Chairman
Subcommittee on Energy and Power

Attachments

cc: The Honorable Frank Pallone, Ranking Member

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Bobby Rush, Ranking Member
Subcommittee on Energy and Power

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

JUL 27 2015

OFFICE OF
GENERAL COUNSEL

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform, Commercial, and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of June 17, 2015, requesting comments on H.R. 2834, the bill you introduced to enact certain laws relating to the environment as title 55, United States Code, "Environment." I understand that the intent of the bill is to restate the National Environmental Policy Act of 1969, Reorganization Plan No. 3 of 1970, and the Clean Air Act, along with related provisions in other Acts, as a new positive law title of the United States Code. The new positive law title would replace the existing provisions.

Limiting confusion and uncertainty about the meaning of the Clean Air Act is not only vitally important to public health and the environment, but essential to effective implementation, and critical for American businesses that make important decisions based on interpretations of Clean Air Act requirements.

The Clean Air Act, which was first enacted in its modern form in 1970, is one of our nation's biggest success stories. Since 1970 it has reduced pollution for six common pollutants (often called criteria pollutants) by nearly 70 percent while the economy has more than tripled in size. The benefits from Clean Air Act programs dramatically outweigh the costs, by as much as 30 to 1 according to a 2011 study. These benefits include preventing over 230,000 early deaths; 200,000 heart attacks; 17 million lost work days; and 2.4 million asthma attacks in 2020.

The Clean Air Act is comprised of numerous programs that focus on different pollutants and different types of sources, which are implemented through numerous federal, state, tribal and local actions, including rulemakings, permit issuances, adjudications, and enforcement. Many of these actions, particularly federal rulemakings, are challenged in court. As a result, there have been hundreds of cases interpreting the Clean Air Act. Understanding the meaning of a particular Clean Air Act provision requires research and review of the rulemakings, guidance documents and court cases that have interpreted the provision – and those that have interpreted similar provisions elsewhere in the Act.

I am concerned that if H.R. 2834 were enacted, it would further complicate the already complex task of interpreting the Clean Air Act in regulatory proceedings and court cases. I understand that the intent of the codification is not to change existing law. Section 2(b)(1) specifically says, "The restatement of existing law enacted by this Act does not change the meaning or effect of existing law." Under 1 U.S.C. § 204 and Supreme Court precedent, therefore, the restatement would remain nothing more than prima facie evidence of the law. *See United States v. Welden,* 377 U.S. 95, 98 n.4 (1964) ("Even where Congress has enacted a codification into positive law, this Court has said that the change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment."). The consequence will be that the agency, industry, stakeholders, and the public at large will need to shift back and forth between two versions of the law, the restatement and the existing law.

The proposed restatement of the Clean Air Act into the U.S. Code as positive law, even without an intent to change the meaning of the law, will likely depart frequently from the Statutes at Large and recourse to the original enactment will be required. H.R. 2834 changes headings and organizational structure. In some cases this may be innocuous, but even something as simple as adding headings can change a court's interpretation of the law. *See, e.g., Cheung v. United States*, 213 F.3d 82, 90 (2d Cir. 2000) ("[T]his Court has recognized that statutory headings may be used to resolve ambiguities in the text."); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1116 (W.D. Wisc. 2001) ("[D]isregard for the heading undermines the … conclusion. Statutes are to be read to give effect to every word, wherever possible. Disregarding a title runs the risk of missing the meaning of the statute."). New headings and structure at best will be confusing and present a real risk that a court or parties will wrongly assume it substantively changed the provision.

Two examples provide just a small window into the difficulties I anticipate should this bill be enacted. First, the restatement makes what appear to be minor structural changes to the Renewable Fuel Standard (RFS) program. Section 221111(o)(2)(A)(i) splits the general charge to the Administrator to promulgate regulations to implement the renewable fuel standard into two subclauses, one with the heading "Gasoline" and one with the heading "Transportation Fuel." The most natural reading of the restatement is that gasoline is not a transportation fuel, which in turn may mean that only the requirement for total renewable fuel content (and not for sub-categories, such as advanced biofuel content) apply to gasoline. In contrast, Section 211(o)(2)(a)(i) of the existing Clean Air Act directs the Administrator to issue regulations to ensure minimum renewable fuel content of gasoline no later than August 8, 2006, and to revise those regulations to ensure minimum renewable fuel content (including separate requirements for advanced biofuel and other sub-categories) for transportation fuel no later than December 19, 2008, (dates that were not included in the restatement). It is clear from the existing law (and with just a minimal knowledge of legislative history) that the direction to issue regulations for gasoline was in the Energy Policy Act of 2005, and that Congress expanded the RFS program in the Energy Independence and Security Act of 2007 to establish requirements for different categories of renewable fuels and apply them to other transportation fuels as well as gasoline.

Second, Section 211111(d) of the restatement fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power plants and other stationary sources. There has been significant confusion concerning this provision, which was enacted as part of the Clean Air Act Amendments of 1990, as well as litigation over its proper interpretation in the U.S. Court of Appeals for the District of Columbia Circuit. By selectively using one text and not including other language that had been enacted by Congress and signed into law by the President, the restated provision, if it were law, would exacerbate the confusion.

To provide technical assistance on whether H.R. 2834, which is 580 pages long, accurately represents existing law would be an enormous undertaking. It is not just a matter of finding *all* of the wording, punctuation, organizational and structural changes from existing law to the restatement, it is trying to determine whether those changes are legally significant. That determination cannot rest just on textual comparisons of the restated and existing provisions, it requires an understanding of how related provisions are worded, and how the provisions have been interpreted in hundreds of rulemaking actions and hundreds of court cases.

Clean Air Act attorneys representing the agency, industry, states, environmental groups and other interested stakeholders already spend countless hours parsing the statute, comparing how words in one part of the Act are similar to (or different than) words used elsewhere, examining changes in the statute as it has been amended over time and studying the legislative history. I am concerned that a restatement of the Clean Air Act would only introduce a new interpretive step and add to this already complicated process. If attorneys were interpreting a restated Clean Air Act, they would still have to check the now existing law to ensure that the restated law was not different. I can easily foresee situations where the agency and the courts would have to analyze both versions to ensure that the restated version did not change existing law. This additional complication would make understanding the Act more complicated instead of less, and thus undermine one of the goals of the restatement.

I appreciate the opportunity to provide comments on H.R. 2834. If you have further questions please contact me, or your staff may contact Josh Lewis in the EPA's Office of Congressional and Intergovernmental Relations at 202-564-2095 or lewis.josh@epa.gov.

Sincerely,

Avi S. Garbow
General Counsel

Office of the Law Revision Counsel
U.S. House of Representatives
Washington, D.C. 20515

September16, 2015

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Marino:

This letter is submitted pursuant to your request that the Office of the Law Revision Counsel provide a response to comments on H.R. 2834 made in the letter of Avi S. Garbow, EPA General Counsel, addressed to you and dated July 27, 2015 (the "EPA letter").

Although the EPA letter does not say so in so many words, it appears that EPA opposes enactment of the Clean Air Act and other source laws into a positive law title of the United States Code. Reduced to its essentials, the objection stated in the EPA letter is—

- limiting confusion and uncertainty about the meaning of the Clean Air Act is vitally important;
- the Act is a complex Act, and understanding its provisions requires research of administrative actions and court cases; and
- EPA is concerned that enactment of H.R. 2834 would complicate the task of interpreting the Act, because—
  - the intent of the codification is not to change existing law; and
  - "[u]nder 1 U.S.C. § 204 and Supreme Court precedent, therefore, the restatement would remain nothing more than prima facie evidence of the law," with the consequence that researchers "will have to shift back and forth between two versions of the law, the restatement and the existing law."

The problem with EPA's analysis is that in its concluding point, EPA relies on the opening part of 1 U.S.C. 1(a), the part preceding the proviso, which provides that a *non-positive law title* of the United States Code is prima facie evidence of the law. That part does not apply to a positive law title. The proviso, which does apply, states that "whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws. ..."

Enactment of H.R. 2834 would have exactly the opposite effect to that suggested by EPA. Today, a researcher who has a question about a provision in the Clean Air Act must first obtain a copy of the Clean Air Act. For most members of the public, that would be chapter 85 of title 42, a non-positive law title of the Code. If there were any question about the wording of any provision in that chapter as against the Act itself, the researcher would have to find that provision as initially enacted and as it may have been amended in various places in the Statutes at Large. Some institutions maintain a compilation of the Act, but there is no guarantee of the accuracy of any such compilation.

Enactment of H.R. 2834 would eliminate the need to research multiple sources to find the law. The text of title 55 would conclusively establish the text of the law.

The EPA letter states that the proposed restatement of the Clean Air Act in a positive law title of the Code "will likely depart frequently from the Statutes at Large . . . ." While some codifications unavoidably require extensive revisions of text, that was not the case with title 55. Aside from moving definitions from the middle or end of body of law to which they apply to the beginning of those provisions, few structural changes were made; and, because we are aware of the great sensitivity of the wording of any environmental statute, relatively little editing of text was done.

The EPA letter states that "recourse to the original enactment will be required." EPA is correct: that is the case in all positive law codification projects. That is why a codification attorney seeks the assistance of Federal agencies responsible for carrying out the source laws within the scope of a codification project, the congressional committees with legislative jurisdiction over those laws, and other interested persons in drafting a codification bill, and that is why the Judiciary Committee invites comment on a bill when it is introduced. All interested persons have the opportunity to compare a proposed title with the source law to determine to their satisfaction that the bill does not change the meaning or effect of the law, as well as to suggest any improvements that may appropriately be made in the context of a codification bill.

With regard to the minimal editing of text that was done in title 55, the EPA letter says that "even something as simple as adding headings can change a court's interpretation of the law" and that new headings and structure will "present a real risk that a court or parties will wrongly assume it substantively changed the provision." While there may be such a risk in the case of a regular bill enacted by Congress, there is no such risk in the case of a codification bill. As the cases cited in the explanation's discussion of section 2 of H.R. 2834 and many other cases involving positive law codification make clear, for a codification bill, it is presumed that minor changes in language are not to be understood as changing the meaning of the source law, but rather as simply achieving consistency of usage, modernization of language, correction of error, clarity of expression, and the like.

The EPA letter offers 2 examples of what are called "difficulties" that EPA anticipates if H.R. 2834 were enacted. The examples do not stand as reasons why H.R. 2834 should not be enacted.

The 1st example offered by the EPA letter is that the "most natural reading" of title 55's restatement of clause (i) of section 211(o)(2)(A) of the Clean Air Act, in 55 U.S.C. 221111(o)(2)(A)(i), is that gasoline is not a transportation fuel, whereas "[i]t is clear from the existing law (and with just a minimal knowledge of legislative history)" that the direction to issue regulations for gasoline in 2005 was expanded in 2007 "to establish requirements for different categories of renewable fuels and to apply them to other transportation fuels as well as gasoline," that is to say, that gasoline is in fact understood to be a category of transportation fuel. Not only is it not a "natural reading," there is nothing in the title 55 restatement to suggest that gasoline is not a transportation fuel.

The 2d example relates to title 55's restatement of subsection (d) of section 111 of the Clean Air Act. EPA says that the restatement "fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power plants and other stationary sources. There has been significant confusion concerning this provision, which was enacted as part of the Clean Air Act Amendments of 1990, as well as litigation over its proper interpretation in the U.S. Court of Appeals for the District of Columbia Circuit. By selectively using one text and not including other language that had been enacted by Congress and signed into law by the President, the restated provision, if it were law, would exacerbate the confusion."

Section 111(d) is restated in section 211111(d) of the title. The text tracks the text of section 111(d) as it appears in the Code at 42 U.S.C. 7411(d)), which tracks the text of the subsection as it was amended by section 108(g) of Public Law 101–549 (commonly known as the Clean Air Act Amendments of 1990) (104 Stat. 2467). The EPA letter does not disclose what legislative language it is that title 55 fails to include, but we surmise that it is language from another amendment of section 111(d) attempted to be made by section 302(a) of Public Law 101–549 (104 Stat. 2574), which would have stricken from section 111(d) the same words that were stricken by section 108(g) of the same law but inserted different words. The amendments made by Public Law 101–549 were first reflected in the Code in Supplement II to the 1988 edition of the Code, published in 1992. With respect to section 302(a), that Supplement included an amendment note for 42 U.S.C. 7411, saying, "§ 302(a), which directed the substitution of '7412(b)' for '7412(b)(1)(A)' could not be executed because of the prior amendment" made by section 108(g). If the amendment made by section 302(a) were to be executed to section 111 of the Clean Air Act, how should it be done? The EPA letter does not say. Nor, in the more than 2 decades following the Code's rendition of section 111(d) or in the more than 8 years since EPA was asked for its input on title 55, has EPA made any communication of which we are aware suggesting that EPA had an issue with that rendition. So the suggestion that section 211111(d) "selectively" uses 1 text and excludes other language that should be included is not well made, because EPA never made known to this Office its belief that there was a selection to be made.

Note that the heading of section 302 of Public Law 101–549 is "**SEC. 302. CONFORMING AMENDMENTS.**" A legislator uses that heading to indicate to the other members of the legislative body that the section contains nothing that would change the meaning or effect of the law, that it contains only technical changes in provisions of law that are inarguably necessary to allow changes made in other sections to be effectuated. For a member to include under the heading "**CONFORMING AMENDMENTS**" a provision that actually is intended to make a change in the meaning or effect of a law, not as an adjunct to but as an addition to changes made elsewhere in a bill, would be seen as a breach of trust among the members, to put it mildly.

The most logical place in Public Law 101–549 in which to look for a change that would require the conforming amendment made by section 302(a) would be in the section that precedes it, section 301 (104 Stat. 2531). That section completely restated section 112 of the Clean Air Act (42 U.S.C. 7412), which is restated as section 211112 of title 55. So the question is, is there any provision in section 211112 that cannot be effectuated without a change in section 211111? Even if Congress had not enacted a conforming amendment in section 302 of Public Law 101–549 as necessary to allow the amendment made by section 301 to be carried out as intended, it would be appropriate to make the conforming amendment in this codification bill. EPA has not identified any provision of section 211112 that, without question, necessitates a conforming change in section 211111. If there is no such provision in section 211112, the reason may be that the inclusion of section 302(a) in Public Law 101–549 was a mistake – perhaps because it was a remnant of an early version of the bill that contained provisions making changes that were later dropped from the bill – and not an attempt to pass off a significant change as a conforming amendment. If that is the case, section 302(a) would properly be treated as a dead letter.

The EPA letter concludes with the observation that it would take some time on the part of EPA and other interested persons to check title 55 against the Clean Air Act to ensure that the restatement does not change existing law. While EPA bemoans the fact that it takes a long time to draft a positive law title, EPA in fact has had plenty of time to review title 55. LRC started work on title 55 in 2007. The lead codification attorney on the project, Tim Trushel, visited EPA twice that year to explain what positive law codification was all about and to ask for EPA's assistance in the drafting. On September 17, 2007, the codification attorney sent EPA a memo asking for its comments. EPA did not respond to the memo. The 1st complete discussion draft of the bill was dated January 1, 2008. A 2d discussion draft was dated January 5, 2009; that draft contains some revisions made in response to an informal review of the draft by the Congressional Research Service. On February 4, 2009, the bill was submitted to the Judiciary Committee, and it was posted on the LRC internet site for comment by all interested persons. Also, an introductory letter was sent to the congressional committees of legislative jurisdiction. Updated bills were submitted on August 12, 2010, and September 20, 2013. EPA finally showed some interest in reviewing the draft, so, on LRC's recommendation, the Judiciary Committee agreed to withhold introduction of the bill for 180 days to give EPA time to review it. To assist EPA in its review, LRC provided EPA a comparison document showing every change in wording made in the restatement of the Clean Air Act and other source laws. When LRC contacted EPA near the end of the 180-day review period, LRC was informed that EPA had decided not to review the bill after all.

Using February 4, 2009, conservatively, as the beginning date, and the date of EPA's letter as the ending date, EPA had about 1619 regular business days in which to review 576 pages of title 55 text. If EPA had chosen to cooperate with the codification project, EPA could have given the draft a complete review by examining about 1/3 of a page per day, hardly an "enormous undertaking," as EPA would have it.

As stated in the explanation accompanying the bill, it is contemplated that subsequent bills will enact additional subtitles in title 55 relating to water, land, and particular substances. The entire point of this codification project is to make it easier for a researcher to find the precise text of the environmental law applicable to any given situation and to determine its meaning without resort to other authorities, to the extent that this can practicably be done. The concerns raised in the EPA letter, unfounded as we believe they are, could be raised against any of the additional subtitles, or, for that matter, against a codification bill dealing with any other subject. We hope that EPA's reluctance notwithstanding, the Judiciary Committee will proceed with the bill, which has already been 8 years in the making, as expeditiously as possible.

Sincerely,

Ralph V. Seep

Ralph V. Seep
Law Revision Counsel

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.

2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.

3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.

4. Each document should be produced in a form that may be copied by standard copying machines.

5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.

6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.

7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.

8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.

9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

a. how the document was disposed of;
b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
c. the date of disposition;
d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms “you” or “your” mean and refers to

For government recipients:

“You” or “your” means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.